IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-885

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ALEXANDER L. STEVAS,
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JOSEPH PANTOJA, JERRY MEYER, CHRIS PEDERSEN,
Petitioners,

vs.

ALL-AMERICAN TRANSPORT, INC.,
AMERICAN FREIGHT SYSTEM, INC.,
TERMINAL TRANSPORT COMPANY, INC.,
MID-CONTINENT FREIGHT LINES, INC.,
AND
INTERNATIONAL BROTHERHOOD OF TEAMSTERS,
CHAUFFEURS, WAREHOUSEMEN, AND
HELPERS OF AMERICA, LOCAL 705,
Respondents.

JOINT BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Did the lower courts err in concluding that: (1) the union fulfilled its duty of fair representation; (2) the employers did not breach the collective bargaining agreement by concurring with the union's interpretation of the seniority provisions concerning placement of certain employees on the seniority list; and (3) the employees failed to exhaust the intra-union remedies available to them prior to filing suit?

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INTRODUCTION

Because of the interrelationship, on the one hand, of the Respondent Union's duty of fair representation, and, on the other, the compliance by all Respondents with the applicable provisions of the collective bargaining agreement governing the seniority replacement of Petitioners, Respondents submit a Joint Brief in Opposition to the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

COUNTERSTATEMENT OF THE CASE

The seniority placement of the Petitioners ("employees") had been governed by a master collective bargaining agreement existing at relevant times between the Respondent Union ("Local 705") and certain employers, among them the Respondent Employers ("employers"). The employees, formerly employed by Mid-Continent Freight Lines, Inc., had their relative seniority determined by the parties' application of the contract's seniority provisions to the nature of the transaction involving the purchase by All-American, Inc. of Mid-Continent Freight Lines, Inc.; the sole transaction about which the employees have complained.

Because the employees were dissatisfied with their seniority placement, they filed a grievance following the All-American/Mid-Continent corporate transactions. The grievance was referred by Local 705 to its counsel for an opinion concerning application of the facts within Local 705's knowledge to the seniority provisions of the master collective bargaining agreement relating to buy-outs, mergers, and consolidations between or among employers signator to the agreement. Counsel reviewed the ICC and corporate documents and advised Local 705 that this transaction constituted a "buy-out" under Article 8, Section 7(a)(2) of the collective bargaining agreement, thus the employees' seniority rights began to accrue at the time the new entity was formed (App.C,p.28a). Local 705 and the employer concurred in the opinion and the employees were so advised. The employees then sued Local 705 for unfair representation and the employers for breach of contract. The district court granted Local 705's motion for summary judgment based on the employees' failure to exhaust their internal union remedies. The case against the employers went to trial on the merits.

At the trial of the employees' claims against the corporate defendants, the district court heard and read all of the evidence concerning Local 705's processing of the grievance (App.B,p.13a). In entering a judgment on the merits for the employer, the district court necessarily determined that Local 705 had not breached its duty of fair representation (App.B,p.13a; App.C,pp.27a-27b).

The court of appeals agreed: "We have no difficulty in agreeing with the district court that the Union provided these plaintiffs

with fair representation" (App.C.,p.28a). Accordingly, the court of appeals affirmed (1) the district court's order of summary judgment in favor of Local 705 on the ground that the employees had failed to exhaust intra-union remedies, and (2) the judgment on the merits for the employer in part on the ground that Local 705 had not breached its duty of fair representation.

Finally, although the employees have not advised this Court, the judgment in favor of Local 705 rests on the alternative finding below that Local 705 had not unfairly represented the employees. As a result of this finding, review of the exhaustion issues tendered by the employees is not warranted.

SUMMARY OF ARGUMENT

The employees do not challenge in this Court the lower courts' findings that Local 705 fulfilled its duty of fair representation. Accordingly, this Court's reversal on the issue of exhaustion of intra-union remedies presented by the employees will have no effect upon the district court's disposition on the merits of the claim of unfair representation.

Moreover, the employees' arguments presented to this Court that exhaustion of intra-union remedies should not be required under the circumstances of this case were not presented to the courts below, nor were facts adduced in support of these contentions. Therefore, this Court should not consider them.

The lower courts' application of the doctrine of exhaustion of internal union remedies is consistent with this Court's holding in *Clayton v Auto Workers Union*, 451 US 679 (1981); the lower courts are in harmony with the *Clayton* principles; and no important federal questions are presented for review.

Concerning the employers, the evidence of record in the lower court showed that despite the claim of the employees that the employers conspired to adversely affect their seniority, the All-American/Mid-Continent transaction was separate and discrete, and the disposition of relative seniority among all affected employees comported with the "buy-out" provisions of the collective bargaining agreement. Both the district court and the court of appeals did consider whether there existed an ultimate purpose of the independent corporations to join at a later date, and upon the facts, found contrary to the contentions and allegations of the employees. In short, that which the employees seek to have this Court consider has been considered by both of the lower courts.

ARGUMENT.

I.

THE EMPLOYEES' FAILURE TO CHALLENGE THE COURT OF APPEALS' ALTERNATIVE HOLDING IN FAVOR OF LOCAL 705 ON THE MERITS WARRANTS DENIAL OF THE PETITION.

It is by now well-established that in order to recover against either an employer or a union in an action brought pursuant to Section 301 of the Labor-Management Relations Act of 1947, 29 USC §185, the employee must establish both that the union breached its duty of fair representation, and that the employer breached the collective bargaining agreement. *See, e.g., United Parcel Service, Inc. v Mitchell*, 451 US 56,62 (1981); *Hines v Anchor Motor Freight, Inc.*, 424 US 554,570-71 (1976). The courts below concluded on the merits that Local 705 fulfilled its duty of fair representation, and the employees do not challenge this conclusion in this Court. Accordingly, the judgment in favor of Local 705 would not be disturbed even if this Court reversed the courts below on the only issue upon which the employees seek review as to Local 705.

II.
THE EMPLOYEES' FAILURE TO RAISE IN THE LOWER COURTS THE FACTUAL ISSUE PRESENTED IN THEIR PETITION, AND THE ABSENCE OF RECORD EVIDENCE UPON WHICH THEIR ARGUMENT IS BASED, PREVENT THEM FROM RAISING IT IN THIS COURT.

This district court's order of summary judgment in favor of Local 705 due to the employees' failure to exhaust their internal union remedies available to them preceded this Court's opinion in *Clayton v Auto Workers Union*, 451 US 679 (1981). *Clayton* issued, however, prior to the filing of the briefs in the court of appeals, and both the employees and Local 705 addressed the application to this case of the *Clayton* test that exhaustion is ordinarily a pre-requisite to the institution of a suit for unfair representation where the intra-union remedies may result in the reactivation of the grievance within the contractual dispute mechanism. Specifically, Local 705 urged, and the court of appeals found (App.C.,pp.24a-25a), that because the contractual grievance procedure contained no time limitations for the processing of non-disciplinary grievances, the employees' grievance could have been reinstated within the grievance machinery following intra-union proceedings (App.C.pp.24a-25a).

The employees urge in this Court the possibility that the joint grievance committee—the employer-union panel empowered to finally resolve disputes under the collective bargaining agreement—might have applied the doctrine of laches to bar reinstatement of the grievance had the internal union forum ordered Local 705 to process the grievance. This contention was neither raised to nor addressed by either of the lower courts nor is it supported by any evidence in the record. This Court ordinarily will not address issues which were neither presented to nor passed upon by the court of appeals. *See, e.g., U.S. v Mendenhall*, 446 US 544,551 n.5 (1981); *Adickes v Kress & Co.*, 398 US 144,147 n.2 (1970). This is particularly true where, as here, the issue is one of fact upon which no evidentiary record has been developed in the district court. *Jenkins v Anderson*, 447 US 231,234 n.4 (1980); *cf. Mendenhall, supra.*

III.

THE JUDGMENT BELOW FOLLOWS THE PRINCIPLES OF *CLAYTON*; THE LOWER COURTS HAVE NOT EXPRESSED DIVERGENT VIEWS ON THIS ISSUE; AND NO IMPORTANT FEDERAL QUESTIONS ARE PRESENTED FOR REVIEW.

Clayton established that exhaustion of internal union remedies is ordinarily[1] a prerequisite to an employee's lawsuit against a union contending a violation of the duty of fair representation where the internal union remedies may either: (1) afford the employee the complete relief that is being sought judicially, or (2) result in the reactivation of the employee's grievance within the grievance procedure of the collective bargaining agreement. 451 US at 685.

The court of appeals applied the second prong of the *Clayton* test after finding that the collective bargaining agreement contained no time limitations for the processing of the grievance at issue herein. Accordingly, had the employees invoked the internal appeals and been successful, there was no contractual barrier to both Local 705 and the employer submitting the merits of the employees' claims to the joint grievance committee for its determination. (App.C,pp.24a-25a).

The court below previously applied the second prong of the *Clayton* test. *Miller v General Motors*, 675 F2d 146 (7th Cir 1982.) In *Miller*, the court of appeals required exhaustion of internal union remedies where the collective barganing agreement specifically provided for the revival of grievances following the intra-union review proceedings. *Id.* at 147-48. To our knowledge no other reported decisions have expressly dealth with this prong of the Clayton test. Moreover, inasmuch as the court of appeals simply applied the clear test set forth in *Clayton*, there is no important federal question present for the Court's consideration. Accordingly, there is no occasion for this Court to now consider this issue.

[1] *Clayton* also conditioned exhaustion upon other considerations, *viz.*, whether the hostility of the union officials would prevent a fair hearing, and whether the internal review procedures would unreasonably delay the employee's opportunity for judicial determination of the merits of his claims. 451 US at 689. The employees expressly acknowledge that neither of these considerations is present here (Pet. at 12).

IV.
THE MATTERS WHICH THE EMPLOYEES URGE THE COURT TO CONSIDER WERE CONSIDERED BY THE COURTS BELOW, AND THE EMPLOYEES' CONTENTIONS WERE PROPERLY REJECTED ON THE BASIS OF THE EVIDENCE.

With respect to the question presented for review regarding the employers it is abundantly clear from the employees' arguments that matters warranting the attention of this Court are not present. Indeed, contrary to the first contention of the employees that their case depends upon a question of law, the issues were resolved in the courts below on the factual questions concerning which provisions of the collective bargaining agreement should be applied under varying circumstances.

The employees' petition reveals that the matter is not one involving conflicting decisions among the various courts nor any important question of federal law which should be settled by the Court. Instead, the case involves merely a series of transactions among various corporations beginning with a discrete, separate, independent, and self-sustaining transaction which the district court and the appeals court found to constitute a "buy-out" with the resulting disposition of the seniority of the employees vis-a-vis their fellow employees. While the employees were "end-tailed", thus their seniority rights were affected adversely, they cannot ask this Court to rewrite the contract. In short, they received what was bargained for. Moreover, Local 705 and the employers were faced with adversely affecting seniority rights of one group of Local 705 employees or the other no matter which position they took. *See Humphrey v Moore*, 375 US 335 (1964).

It is noteworthy that the question presented for review asks whether "the ultimate purpose of nominally independent corporations to join under a common roof can be considered." In the first place, the question presented to the Court seems to be whether amidst various corporate activities involving employer judgements, that there comes a time that an "ultimate" decision is made to pursue a certain course of conduct, and federal law should be enunciated by this Court that the last decision retroactively applies, dramatically colors, and forever changes the character and purpose of the events which went before it.

While there may be some justification for consluding that the first step affects all that comes after, no purpose would be served by having this Court consider whether the ultimate and last act changes the character of preceding steps in a series of independent corporate transactions and acquisitions.

Perhaps more importantly, to the extent that the employees ask this Court to decide whether the ultimate purpose of the actors should be considered in determining the applicable contract provisions or the consequences of resulting changes in relevant seniority, the factor was considered by both of the courts below. The decision of the Honorable Frank J. McGarr, whose opinion was stated orally at the conclusion of nearly three days of trial on the merits, contains a recitation of the employees' arguments concerning the allegation that the employers attempted by a total long-term series of corporate maneuvers to interfere with the rights of these employees (App.B.,p.11a). Because the district court felt that the possibility existed that the theory warranted consideration, it, as the record throughout reflects, "gave the Plaintiffs a great deal of latitude in presenting their case and in developing any aspect of that theory that they thought was appropriate" (App.A.,p.lla). After detailed recitation of the position of the employees and the facts of record, the district court concluded on the evidence that the "ultimate" transaction, the consolidation of All-American with Terminal Transport, was not germane because it was "a situation with a different consequence of different sections of the contract" (App.A.,p.12a). The district court, therefore, as the employees would have this Court do, did consider all of the transactions detailed in the record and held that "the end results of hearing all the evidence on that is the inevitable conclusions that it does not help us in deciding the case before the (court)" (App.A.,pp.12a-13a).

Continuing, the court further considered the sum, substance, and significance of the transactions in the light of the employees' theory. The court (ApplB., p. 13a) stated:

> "The plaintiff has a theory that the All-American buy-out of Mid-Continent was not a simple, discreet [sic], unique transaction, but rather the first step in a complex series of corporate maneuvers, orchestrated by Texas Gas, and that part of the scheme was to get

> Mid-Continent routes and effectuate savings by eliminating Mid-Continent drivers.

On this very evidence, the opinion contains the plain language that:

> ". . . But the plaintiffs' contention that this reveals that, at the time of the orginal All-American buy-out of Mid-Continent, we were really kicking off a long-range conspiracy to deprive the plaintiffs of their rights is not supported by that document or by any other evidence in the case." (App.B.,p.14a).

Thus, when the employees frame an issue presented for review whether in connection with the allocation of seniority, the ultimate purpose of nominally independent corporations to join under a common roof can be considered, they fail to recognize that their contention was considered but was rejected. Continuing, the district court said:

> "Whether or not this was a long-range plan may or may not be true; but it isn't relevant. Whatever the subsequent steps were, the first step was a separate, unique, discreet [sic] transaction--the buy-out of Mid-Continent by All-American." (App.B.,p.14a).

The district court simply concluded that the evidence demonstrated that subsequent transactions were not relevent to the issue of the applicability of the several seniority provisions and that the unique and discrete transaction in which All-American bought out Mid-Continent was implemented in conformity with the appropriate contractual obligations.

Subsequently, the appeals court agreed with the lower court's determination "on the merits of the question" that the transaction in which All-American acquired Mid-Continent was distinct from the latter corporate transaction and that its rejection of the employees' claim that this transaction was part of a scheme designed to interfere with their seniority rights resulted in factual determinations by the lower court which were not "clearly erroneous". The appellate court considered the conspiracy claims to be unsupported, leaving "little to challenge the employers' application of the contract" (App.C.,p.29a), and, after examining

in detail each corporate transacation, found the critical transactions to be quite different one from another. There is no doubt that the courts below did indeed consider the employees' allegations concerning the "ultimate" purpose, and on the facts, the allegations were rejected. No purpose would be serving by having this Court decide a question which has been thoroughly considered by the lower courts.

The employees have taken one sentence of the district court's opinion concerning relevancy out of context. That is insufficient predicate for the exercise of this Court's discretion.

CONCLUSION

WHEREFORE, Respondents respectfully request that the petition be denied.

Respectfully submitted,

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